In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 278

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY, KING EDWARD TOBACCO COMPANY OF FLORIDA, AND MAY TOBACCO COMPANY

SUPPLEMENTAL MEMORANDUM FOR THE SECRETARY OF LABOR

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1. On the question of whether the bulking plant operation is "really incident to farming" (see *Maneja* v. *Waialua Agricultural Company*, 349 U.S. 254 at 266), the Government's brief points out the undisputed fact that farmers ordinarily do not perform this bulking process. Of approximately 300 farmers who grow this type of tobacco, only nine maintain and operate bulking plants, and only five, or 1.6%, maintain bulking plants.

processing only tobacco grown by the processor (R.K. 56). Eighty percent of the 300 farmers growing this type of tobacco grow less than 25 acres per year and the majority grow only from 1½ to 10 acres per year (R. 36, 146). Thus respondent May which grows about 90 acres is by no means the ordinary small farmer with respect to this type of crop. May's acreage constitutes about 3½% of the total acreage supplying the bulking plants in Gadsden County as shown in the exhibit introduced in the record by respondent King Edward (R.K. 84a). While 90 acres might not be an unusually large farm for some crops it is obviously quite a large-scale Type 62 tobacco farm, particularly in view of the admitted fact that "the cost per acre of production, and the price per acre which the farmer receives for his crop, are * * * the highest of all agricultural crops produced in the United States, with the exception of other types of wrapper tobacco grown in other sections of the country" (see affidavits of J. D. Vrieze, General Manager of the King Edward Tobacco Company, and of Fred L. May, President of May Tobacco Company, R.K. 7, 67).

Thus the May Company is not simply an ordinary small farmer. It is undisputed that the ordinary small farmer growing this type of tobacco does not, and could not, economically own and operate a bulking plant. While the record does not show that the bulking plant of the May Company specifically is equipped with expensive equipment like that of the Budd and King Edward

plants, the May Company voluntarily intervened in the case on the ground of the similarity of its bulking operations to the King Edward operations, and the trial court found that the "May Tobacco Company case is in every respect similar to that of the King Edward Tobacco Company case" (R.K. 61). This finding seems wholly justified, not only by reason of May's voluntary intervention, but on the basis of the affidavit filed by the May Company, which describes its bulking operations in terms virtually identical to the descriptions by respondents Budd and King Edward (compare R.B. 26-28 and R.K. 50-52 with the May Company affidavit, R.K. 69-71).

That the bulking operation is an ordinary incident to the *manufacture* of cigars rather than an incident to farming (just as the curing, redrying and aging of non-cigar tobacco, after it is purchased at the auction warehouse by dealers and cigarette manufacturers, is an incident to the manufacture of cigarettes) is evident from the facts in the record relating to respondents King Edward and Budd. The sole purpose of this extended bulking process (which takes from six to twelve months or more) is to secure the proper flavor, aroma, burning qualities and, most importantly, the desired color and appearance for use as cigar wrappers (as the affidavit filed by the May Company, as well as the affidavit filed by King Edward, show, R.K. 8, 71).

The record shows that Budd's bulking plant (which purchases all of the tobacco it bulks) is

closely affiliated with the Budd Cigar Company, the husband member of the partnership sued in the instant case being the president of the cigar manufacturing company (R.B. 141-142). The cigar factory is at the same address as the Budd buiking plant, and over two-thirds of the tobacco bulked at the Budd plant is "sold, assigned or transferred" to the Budd Cigar Factory (representing a total value of $586,857.17) (R.B. 141-142).

The record shows that respondent King Edward is closely affiliated with Jno. H. Swisher and Son, Inc., Carl F. Swisher being the president of the King Edward Company (R.K. 13), and that respondent King Edward leases all of the lands on which it grows tobacco from Swisher and Son, Inc., and sells over 50% of the tobacco it bulks to Swisher and Son (R.K. 13). Swisher and Son, of course, is a well known manufacturer of cigars in Florida and Georgia, notably of the King Edward brand. And King Edward purchases more of the total amount of tobacco bulked at its three plants than it grows itself, the record showing that in 1951 King Edward purchased from other growers about two-thirds of the total tobacco processed at its three plants (R.B. 13).

The record does not show whether the May Company is affiliated with any cigar manufacturer, but only that it sells and ships its bulked tobacco to cigar manufacturers (R.K. 68). Admittedly the record is more sparse on the May Company than it is on respondents Budd and King

Edward, inasmuch as the May Company was a voluntary intervenor.[1] It may be noted, however, that the May Company also filed a cross-motion for summary judgment (R.K. 66), and, since it is claiming an exemption, the burden was upon it to prove any differences from the King Edward operation. Thus if the record is inadequate as to the May Company, it is not entitled to have factual doubts resolved in its favor.

2. On the "area of production" issue, under Section 13(a)(10), respondents rely primarily on two lines of argument in attacking the reasonableness of the Administrator's 2,500 population standard (see Separate App. 20-25 and Supplemental App. 41-51, explaining the basis for adoption of this standard). Respondents' first line of argument rests on statements made by Senator Schwellenbach about the apple plant in Winchester, Virginia, to which reference was made in oral argument. In the thought that the pertinent citations to the Appendices may be helpful to the Court, the Government's answer to this argument is here summarized with the appendix references. The colloquy to which respondents and the amici refer is printed in the Government's Separate Appendix, page 62. It will be noted that Senator Schwellenbach was very careful to qualify his

[1] At the time of the trial court's first memorandum decision, it was overlooked that motions for summary judgments had not been filed by or against the May Company. This was remedied by the subsequently filed motions and by the supplemental decision of the Court (R.K. 66, 76-77).

answer by stating that the exemption would apply "*if*" the conditions of the proposed exemption were met. It will further be noted that there was no mention of the population of Winchester, Virginia, and there is no basis for assuming that Senator Schwellenbach, who was from the State of Washington, knew the population of Winchester, Virginia. That his answer had no reference to the meaning of "area of production" is evident from his following colloquy with Senator Black (printed on pages 64-65 of the Government's Separate Appendix), where Senator Schwellenbach made it clear that the meaning of that term would have to be defined administratively. It may be noted also that the proposed amendment to which Senator Schwellenbach was referring (which appears on page 53 of the Separate Appendix) did not at that time contain the provision for a definition by the Administrator. Finally, it is significant that Senator Schwellenbach was Secretary of Labor in December 1946 when the current definition was issued.

The second line of respondents' attack on the 2,500 population standard rests upon the statement of the Court of Appeals that in this particular case it is clear that the Administrator's standard is invalid. Even assuming that a standard designed for general application must operate accurately in every particular instance (and we think it clear that its validity would not be affected by its operation in a particular or a few particular cases), the very data on which respondents rely

in claiming that the town of Quincy is plainly a rural agricultural community, far from proving the unreasonableness of the Administrator's standard, in fact demonstrates the unreliability and impracticability of the more flexible alternative respondents propose. They rely primarily on the affidavit of the Manager of the Quincy Chamber of Commerce (R.K. 10). In that affidavit he states (on the basis of some private surveys made by him) "that the proprietors or managers of 78% of the business establishments in Quincy stated that their business is dependent directly *or indirectly* upon agriculture." (Emphasis added.) Even if this were not pure hearsay, obviously it does not follow that, because a business "indirectly" depends upon agriculture, it is therefore agricultural and not industrial. The affidavit also contains figures on the wage earners in Quincy (the source of which nowhere appears, and they are inconsistent with the Bureau of Census figures), but even on the basis of the figures stated in the affidavit less than one-third of the wage earners in Quincy are claimed to be employed on farms "either the year round *or seasonally*" (Emphasis added). Thus even with respect to this one-third, there is no indication to what extent they work part-time on farms and part-time in industry.

In contrast, the affidavit of the Director of Census of the United States Department of Commerce (R.K. 31-32) shows considerably more employment in *manufacturing* in Quincy than in

agriculture, forestry and fishery combined. According to these Census statistics, employment in agriculture, forestry and fishery constituted only about 15% of the total employment shown.

This is not to say that the Census data, either, is reliable for purposes of distinguishing rural and urban areas. As the hearing officer, in his findings after the 1951 hearings on "area of production," pointed out, there are obvious deficiencies in the Census data for purposes of making the distinction between rural and urban areas. But the point is that this evidence corroborates the Administrator's conclusion (after thorough and careful exploration of the feasibility of a flexible standard, see Government's Supplemental Appendix, pages 47-51) that the flexible standard here urged by respondents was wholly impracticable because of the unavailability of reliable data on which it could be based.

3. Counsel for respondents Budd and King Edward repeated in oral argument the statement made twice in their brief (pp. 41, 52) that the Government itself "admitted in this very litigation that a farmer's exemption under 13(a)(6) does not depend upon whether the independently owned packing plant which packs tobacco grown by others enjoys exemption under Section 13(a)(10)." We call attention to the fact, which respondents have failed to note, that the so-called admission quoted on page 41 of their brief was stricken by an amendment to the response to defendants' requests for admission, by substitution

of a simple answer that plaintiff "neither admits nor denies the matters contained" therein "since he is without such knowledge" and, in addition, since "said request obviously calls for a conclusion of law." (R.K. 55). As a matter of fact, the Secretary has filed suit against the *American Sumatra Tobacco Corporation* (the Company referred to in the so-called admission), which is pending in the District Court (N.D. Fla., Civ. Action No. 390).

4. In answer to Mr. Justice Frankfurter's inquiry as to what notice was given of the hearings preceding the adoption of the current definition of "area of production," a notice was published in the Federal Register on January 6, 1945 (10 F.R. 261), specifically directed to the proposed definition with respect to tobacco. Notice was also published in the Federal Register prior to the 1951 hearings on proposals to amend the definition (46 F.R. 1741).

It may also be noted that the regulation defining the term itself includes a specific provision that any interested person or association wishing a revision may petition for amendment by submitting "in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them" (29 CFR Section 536.3 (as amended 6 F.R. 1437)).

CONCLUSION

While it is our position that the trial court correctly held that the bulking operation is not inci-

dent to farming (under Section 13(a)(6) and 3(f)) nor among the operations enumerated in Section 13(a)(10), if this Court should conclude otherwise, the design of the Act to "equalize the impact of the Act" on all such similar processing operations (see *Waialua*, 349 U.S. at 269) would best be achieved by holding the bulking operations of all three respondents to be operations under Section 13(a)(10) only. In that event, all of the bulking plants would be subject to the same limitation of "area of production".

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
JAMES R. BILLINGSLEY,
Attorney,
Department of Labor.

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